U.S. Department of Labor

Office of Administrative Law Judges
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Date: November 15, 1999
Case No.: 1989-ERA-22

In the Matter of:

SHANNON T. DOYLE
Complainant

against

HYDRO NUCLEAR SERVICES
Respondent

RECOMMENDED DECISION AND ORDER AWARDING ATTORNEY FEES

A Final Recommended Decision and Order on Damages was issued by this court February 12, 1999, including an order that Complainant's counsel submit a petition for attorney fees. On March 9, 1999, Complainant and his counsel, Stephen M. Kohn, Esq. (collectively "Complainant"), submitted "Complainant's Application for Attorneys' Fees and Costs." ("Complainant's Application"). On April 2, 1999, Respondent submitted a "Memorandum of Law in Opposition to Complainant's Second Petition for Attorney's Fees and Costs."[1] ("Respondent's Opposition"). Complainant then submitted a "Reply to Respondent's Memorandum of Law in Opposition to Complainant's Second Petition for Attorney Fees and Costs" on April 12, 1999. On April 20, 1999, Respondent filed a "Motion to Strike Complainant's Reply Brief or Alternatively For Leave to File a Reply Brief." Finally, on May 4, 1999, Complainant filed a "Response to Respondent's Motion to Strike Complainant's Reply Brief."

MOTION TO STRIKE

Before proceeding to the specifics of fees and costs, I must first address Complainant's Reply and the subsequent motions. Respondent points to 29 C.F.R. § 18.6(b), which states that unless the administrative law judge provides differently, "no reply to an answer, response to a reply, or any further responsive document shall be filed." (See Respondent's Motion to Strike, April 20, 1999, p. 1). Complainant makes numerous arguments for allowing a Reply in his Response: both parties have

previously filed "Reply" or "Response" briefs without objection; that Respondent raised certain unspecified issues for the first time in the Opposition; that in the previous Recommended Decision and Order on Attorney Fees and Costs, I drew inferences against Complainant for failing to respond to issues raised by Respondent; that "the interests of judicial economy" would be best served by allowing the Reply, as Complainant voluntarily reduced some amounts claimed; and that striking the Reply would result in an incomplete record, increasing the likelihood of appeal of these issues to the ARB. (See Complainant's Response, May 4, 1999, pp. 2-3).

After reviewing the arguments, I GRANT Respondent's Motion to Strike. First, the language of the regulation is clear: no replies or responses to replies shall be filed, "unless the administrative law judge provides otherwise." 29 C.F.R. § 18.6(b). While it is true that I previously accepted replies and responses without comment, in order to move the proceedings at this level to a close and to keep an already voluminous record under some control, I choose not to allow further pleadings now. Second, it is unclear exactly what "new issues" Respondent raised in its Opposition, and Complainant does not provide any additional explanation. Third, since I have specifically refused a Reply to the Opposition, I will not allow the lack of response to influence my reasoning in this matter. Fourth, while Complainant has voluntarily reduced the hours claimed, this small deduction out of the entire total is not sufficient reason to allow further pleadings on the issue of fees and costs. Finally, I am unpersuaded that the threat of appeal to the ARB is reason to allow further pleadings; as to Complainant's assertion that the record would be incomplete without the Reply, I note that counsel has an obligation to properly document all amounts claimed in the first instance.

MERITS OF THE FEE APPLICATION

The Energy Reorganization Act ("ERA") provides that if Complainant prevails, at the request of the Complainant, Respondent shall be assessed "a sum equal to the aggregate amount of all costs and expenses (including attorney's and expert witness fees) reasonably incurred . . . for, or in connection with, the bringing of the complaint . . . ." 42 U.S.C. § 5851(b)(2)(B). In its February 12, 1999 Final Recommended Decision and Order on Damages, the court found Complainant had prevailed within the meaning of the statute, and ordered the submission of a fee petition.

Both parties agree that the proper way to determine a fee is the "lodestar" method. This requires multiplying the number of hours reasonably expended by a reasonable hourly rate. See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Backen v. Entergy Operations, Inc., No. 97-021, 96-ERA-18, (ARB Dec. 12, 1996), slip op. at 1 n.2. Complainant must submit evidence supporting the hours worked and rate claimed; where documentation is inadequate, the award may be reduced. Hensley, at 433. Hours not "reasonably expended" may also be excluded. Hensley, at 434.

ATTORNEY FEES

Complainant has requested a total of $226,031.47 in attorney fees, broken down as:

Name	Hours	Rate	Total (Lodestar)
Stephen Kohn	628.95	$325.00	$204,365.23
Annette Kronstadt	24.75	$250.00	$5,941.24
Law Clerks	185	$85.00	$15,725.00
TOTAL			$226,031.47

(See Complainant's Application, p. 42). Respondent argues Complainant is entitled to no more than $93,781.33 in total attorney fees.[2] (See Respondent's Opposition, p. 48).

Rates Billed

Stephen Kohn

Mr. Kohn seeks $325 per hour for his services, and has submitted several affidavits in support. Mr. Kohn's own affidavit shows that he is a respected and experienced litigator with particular expertise and experience in the representation of environmental and nuclear "whistleblowers;" the affidavit also states that this case was taken on a contingent fee basis, and that Mr. Kohn and his firm were forced to turn away other paying clients due to the complex nature of this case. (See Complainant's Application, Exhibit 3). Mr. Kohn admits that the requested $325 per hour is slightly above the "Laffey Matrix" rate (an average of rates charged by attorneys in the Washington, D.C. area), but he states that he has been awarded rates above this "matrix rate" in the past, and that the requested rate is only slightly more than what he was awarded in other recent cases. (See Complainant's Application, Exhibit 3). An affidavit from Mr. Joseph Kaplan (an experienced labor lawyer in the Washington D.C. area) states that based upon his own experience, his review of the work performed by Mr. Kohn, and his knowledge of Washington, D.C. attorney market rates, Mr. Kohn's "current market rate" is no less than $325 per hour. (See Complainant's Application, Exhibit 2). An affidavit from Mr. Joel Bennett (another respected Washington D.C. attorney) was somewhat dated when presented to the court (signed November 1998), but it states that Mr. Bennett annually reviews attorney fee cases involving the U.S. government in order to update a book, and that based on his review of Mr. Kohn's work product, prior similar fee awards, and his own experience, he believes that $325 per hour is reasonable and within the range of prior fee awards for similar attorneys in similar cases. (See Complainant's Application, Exhibit 1).

However, Respondent argues that Complainant has not demonstrated that other attorneys of similar experience and practice areas actually charge this rate, as the two affidavits presented by Complainant only attest that the rate requested is "reasonable." (See Respondent's Opposition, pp. 13-14). In addition, Respondent argues that other attorneys of comparable or greater experience in the same metropolitan area bill at a lesser rate, citing three examples of attorneys within Respondent's counsel's own firm (all with two to four more years of experience) who only charge between $260-310 per hour.

(See Respondent's Opposition, p. 14). Respondent also argues Complainant's requested rate is a dramatic increase from the $245 per hour previously awarded by this court; if the previous $245 rate was simply adjusted for inflation (using the Consumer Price Index), the new rate should only be $262 per hour. (See Respondent's Opposition, pp. 14-15). Based on the above, Respondent argues the proper rate for Mr. Kohn is $260 per hour.

[Page 4]

A reasonable attorney's fee is based on the rates prevailing in the community for similar services from attorneys of similar skill, experience, and reputation. See Blum v. Stenson, 465 U.S. 886, 889, n. 11 (1984). I also will consider the "Johnson factors" when setting a reasonable fee:

1. The time and labor involved;
2. The novelty and difficulty of the questions involved;
3. The skill required to properly perform the legal service;
4. Preclusion of other employment by the attorney as a result of accepting the case;
5. The customary fee;
6. Whether the fee is fixed or contingent;
7. Time limitations imposed by the client or the circumstances;
8. The amounts involved and the results obtained;
9. The experience, reputation and ability of the attorney;
10. The "undesirability" of the case;
11. The nature and length of the professional relationship with the client;
12. Awards in similar cases.

See Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir., 1974), overruled on other grounds, Blanchard v. Bergeron, 489 U.S. 87 (1989).

After considering the arguments and evidence presented, I conclude that neither of the alternative methods urged by Respondent to calculate a reasonable fee would yield a fair result. First, there is no indication that the other attorneys described by Respondent practice in the same specialty as Mr. Kohn, or that they are as skilled or experienced in whistleblower cases as he is; also, simply adopting the rates of these other attorneys fails to consider the many factors enumerated in Johnson which are specific to the work in this particular case. Similarly, using inflation as the sole indicator of the acceptable increase in Mr. Kohn's rate fails to account for his increased experience over the years in question,[3] and again for many of the case-specific Johnson factors. Based on all of the evidence, including a careful consideration of the Johnson factors[4] and a search for rates awarded to Mr. Kohn on previous fee applications before the Office of Administrative Law Judges, I am persuaded that a reasonable fee rate in the present matter is $300.00 per hour.

Annette Kronstadt Complainant seeks $250 per hour for Ms. Kronstadt. Complainant has provided little evidence in support of this rate, other than Mr. Kaplan's affidavit which states without explanation that based on his review of an affidavit submitted by Ms. Kronstadt in the first fee petition in 1995, her current market rate is $250 per hour. (See Complainant's Application, Exhibit 2, p. 7). Mr. Kohn's own affidavit does not address Ms. Kronstadt's market rate, merely attesting that the work she performed was necessary to successful prosecution of the case. (See Complainant's Application, Exhibit 3, p. 12).

[Page 5]

Respondent objects to any increase in Ms. Kronstadt's market rate, arguing Complainant failed to produce satisfactory evidence that the new rate is based on rates prevailing in the community for services from attorneys of similar skill, experience, and reputation. (See Respondent's Opposition, p. 15). Respondent suggests that Ms. Kronstadt's market rate be set at $180 per hour, the same as in the first fee award of 1996. (See Respondent's Opposition, p. 15).

I agree that Complainant failed to present sufficient evidence to justify a substantial increase in Ms. Kronstadt's market rate. However, I will adjust her previously awarded rate upward based on the inflation rates cited by Respondent. (See Respondent's Opposition, p. 14 (3% inflation increase in 1996, a 2.3% increase in 1997, and a 1.6% increase in 1998)). This results in an approximate reasonable market rate of $195 per hour.

Law Clerks As Respondent made no objection to the hourly rate requested for the work of the law clerks, and Mr. Kohn's affidavit indicates that $85 is the present Laffey Matrix rate for law clerk work in the Washington D.C. area (see Complainant's Application, Exhibit 3, p.13), I will accept this figure. Therefore, the market rate for law clerk work is set at $85 per hour.

Hours Billed

Respondent objects to many of the hours claimed by Mr. Kohn, Ms. Kronstadt, and the various law clerks.

Mr. Kohn

Duplicate Billing

Respondent objects to a number of the hours billed by Mr. Kohn, arguing that they represent either duplicate billings for the same hours of work, or are correct billings but are duplicative work (and therefore unnecessary). (See Respondent's Opposition, pp. 16-17). After reviewing the billing records submitted by Complainant (See Complainant's Application, Exhibit 3, Attachment A), I agree that these items probably represent duplicate time entries,[5] and a total of **8.16 hours** will be struck.

Erroneous Attorney Billing for Phone Calls

Respondent also objects that Complainant over-billed the time spent on various phone calls, or by billed for calls with no corresponding telephone charges (as demonstrated by comparing attorney billing records with the various telephone records submitted). (See Respondent's Opposition, pp. 17-20). After reviewing the records, I agree that there are several severe instances of over-billing,[6] as well as numerous billings uncorroborated by the accompanying telephone bills. Therefore, a total of **31.43 hours** will be struck.

Billing for Appellate Work

Respondent next objects to Complainant billing for time spent on appellate work related to this case. The previous rule was that the Secretary (and hence this court) had no authority to award fees for appellate work, based on DeFord v. Secretary of Labor, 715 F.2d 231 (6th Cir. 1983). This rule

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has since been changed, and the Secretary (and thus the Administrative Law Judge in his role of issuing a "recommended" Decision to the Secretary) may now generally include the costs of appellate work. (See Delcore v. W.J. Barney Corp., 1989-ERA-38 (ARB Oct. 31, 1996), citing Blackburn v. Reich, 79 F.2d 1375 (4th Cir, 1996)).

However, the ARB has stated that it is still compelled to follow the DeFord rule in the Sixth Circuit, although it will follow Delcore elsewhere. (See Pillow v. Bechtel, 1987-ERA-35 (ARB Sept. 11, 1997), citing Sprague v. American Nuclear Resources, Inc., 1992-ERA-37 (Sec'y July 15, 1996)). Thus, Complainant may recover for work before other circuits, but not for any work done before the Sixth Circuit. However, as it is unclear which of the hours in question were devoted to work before each circuit, the court has no choice but to strike all **8.53 hours**.[7] (See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (where documentation inadequate, award may be reduced)).

Work to be Billed at Lower Rates

Respondent argues that many of the hours billed by Mr. Kohn should have been billed at the lower rate of a junior attorney (over 300 hours), or the even lower rate of a paralegal (over 50 hours). For example, Respondent argues that work such as reviewing motions, researching, and drafting letters should be billed at the lesser rate for a junior attorney, while such tasks as file review, organization, and factual investigation should be billed at a paralegal rate. (See Respondent's Opposition, pp. 26-34). Some courts have suggested that work which requires lesser skill may be compensated at a lesser rate, as such work does not become more valuable simply because a senior attorney is performing it. (See, e.g., Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir., 1974)). However, it is generally not the court's policy to award different rates to the same attorney for different tasks performed; instead, in weighing the necessity and excessiveness of the work performed, the possibility that certain work could have been performed by a person with less expertise at a lesser hourly rate is a factor considered by the court in its reduction of hours awarded.

After a careful review of the hours sought and the tasks performed, as well as the objections thereto, I feel the following deductions for work which could have been performed by a more junior attorney or performed by a paralegal are appropriate:

10 hours of the 31.08 hours billed in January and February 1996 for the research and preparation of a brief to the ARB;
1 hour of the 3 hours billed October 21, 1996 for a letter to opposing counsel;
1 hour of the 2 hours billed October 24, 1996 for "reviewing the pay record re: average wage rate;"
1.5 hours of the 3 hours billed June 23, 1997 for review of wage rate data;
5 hours of the 8 hours billed October 16, 1997 for a phone call with Complainant and research into average wage rate;
3 hours of the 6 hours billed November 18, 1997 for research;
0.10 hours of the 0.25 hours billed December 9, 1997 for managing data;

[Page 7]

1.5 hours of the 3 hours billed January 15, 1998 for research;
1 hour of the 2 hours billed February 4, 1998 for review of cases;
1.5 hours of the 5 hours billed February 9, 1998 for review of wage data and various proposals;
0.50 hours of the 1.33 hours billed February 12, 1998 for review of wage data;
0.33 hours of the 0.83 hours billed February 17, 1998 for review and organization of the file;
1.5 hours of the 3 hours billed March 16, 1998 for research on IME's;
1 hour of the 3.42 hours billed March 17, 1998 for review and editing of a draft stipulation;
1.5 hours of the 2.42 hours billed March 31, 1998 for review /organization of the file;
0.50 hours of the 0.83 hours billed June 1, 1998 for review of the file;
1 hour of the 2 hours billed April 2, 1998 for research;
4.5 hours of the 9 hours billed June 8 and 9, 1998 for organization and preparation of presentation and exhibits;
0.50 hours of the 1.25 hours billed June 11, 1998 for review of medical records prior to shipment to Respondent;
0.75 hours of the 1.5 hours billed June 11, 1998 for review of prior record materials for prior earnings dates;
0.75 hours of the 1 hour billed July 31, 1998 for exhibit preparation;
0.33 hours of the 0.67 hours billed August 11, 1998 for compilation and review of Complainant's tax records;
3 hours of the 6 hours billed August 17, 1998 for research of case law;
1 hour of the 2 hours billed September 7, 1998 for research and review of cases;
2 hours of the 3.75 hours billed September 9, 1998 for review of the file;
0.50 hours of the 1.25 hours billed September 15, 1998 for review of prior discovery requests and responses;
1.5 hours of the 3 hours billed September 25, 1998 for review of faxes regarding deposition costs;

1 hour of the 2 hours billed October 1, 1998 for review of an affidavit filed by Complainant and his testimony;
4 hours of the total 9 hours billed October 2 and 3, 1998 for preparation for the depositions of Complainant and his wife;
0.50 hours of the 1 hour billed October 3, 1998 for organization of case/deposition data; **2 hours** of the 4 hours billed October 16, 1998 for research;
2.5 hours of the 5 hours billed November 9, 1998 for research;
3 hours of the 6 hours billed November 10, 1998 for research;
2.5 hours of the 5 hours billed November 11, 1998 for research;
1 hour of the 2 hours billed December 8, 1998 for research;

[Page 8]

0.25 hours of the 0.50 hours billed December 14, 1998 for research;
1.75 hours of the 3.75 hours billed January 4, 1999 for review of Complainant's financial records;
0.33 hours of the 0.75 hours billed January 25, 1999 for research;
2 hours of the 4 hours billed January 26, 1999 for drafting and revising proposed final recommended decision and order;
1 hour of the 2 hours billed February 5, 1999 for research;
1 hour of the 1.5 hours billed February 5, 1999 for review of a deposition;
0.75 hours of the 1.33 hours billed February 10, 1999 for preparation of a motion for deposition costs;
0.67 hours of the 1.67 hours billed February 18, 1999 for review of wage rate materials;
0.50 hours of the 1 hour billed March 2, 1999 for research;
2 hours of the 3 hours billed March 2, 1999 for review and organization of the file;
2 hours of the 3 hours billed March 3, 1999 for compilation of information for fee petition;
12 hours of the 27 hours billed March 4, March 8, and March 9, 1999 for preparation of the fee petition; and
4.5 hours of the 8.83 hours billed March 5, 1999 for research regarding the fee petition.
Thus, **92.01 hours** will be deducted from Mr. Kohn's total.

Excessive Conferencing

Respondent also objects to the hours billed by Mr. Kohn for conferences with his firm partners or Ms. Kronstadt (see Respondent's Opposition, pp. 22-23, (citing Blum v. Witco Chem. Corp., 829 F.2d 367 (3rd Cir. 1987) (urging close scrutiny of hours claimed for consultation between senior counsel))). However, since the hours billed for consultation with Mr. Kohn's partners involved major decisions (such as case or mediation strategy), no other partner submitted a fee request for those hours, and the total number of hours claimed is small (3.58 hours) when compared with the total number of hours claimed (628.95 hours, prior to reductions), I find these hours to be reasonable.

I am more concerned with the hours billed for conferences with Ms. Kronstadt. While Mr. Kohn was clearly supervising her work closely, I feel that the hours billed by Mr. Kohn for such consultations are excessive, especially when Ms. Kronstadt also billed for these same hours. Therefore, I will reduce these hours by half, deducting **3.4 hours**.

Wasteful or Unnecessary Work

Respondent also objects to some of Mr. Kohn's hours as "wasteful, excessive, unproductive, duplicative, or otherwise unnecessary." (Respondent's Opposition, p. 23). First, Respondent objects to 12 hours spent drafting and revising three strategy letters to Complainant, which I agree seems excessive in light of the large number of hours billed for phone conversations with Complainant. (See Respondent's Opposition, pp. 23-24). While Mr. Kohn certainly had an obligation to keep

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Complainant informed, I feel that the average of four hours per letter is excessive, especially to reduce to writing what presumably was already discussed during phone conversations. Therefore, I allow only 2 hours per letter, or a total reduction of **6 hours**.

Respondent also objects to 2.92 hours billed for the drafting and revision of two motions to supplement the record, especially since these motions were later rejected by the ARB on procedural grounds. (See Respondent's Opposition, p. 24). However, it is a longstanding principle that hours spent need not be denied simply because Complainant was unsuccessful on particular issues. Despite Respondent's assertion that the ARB found the motion to be "frivolous" (see Respondent's Opposition, p. 24), I find no indication of this in the ARB's decision. (See Doyle v. Hydro Nuclear Servs., 1989-ERA-22 (ARB Sept. 6, 1996)). No reduction will be made for hours spent on this motion.

Finally, Respondent objects to the "significant amount of time" devoted to a "frivolous" July 1, 1998 Motion for Summary Judgment filed by Complainant. Respondent argues that Complainant filed this motion knowing it was premature because further factual discovery was necessary and the parties were still attempting to resolve certain issues by stipulation. (See Respondent's Opposition, p. 24-25). While the motion was denied and portions were struck (see Doyle, (ALJ Order, Sept. 3, 1998)), I disagree that this motion should be considered frivolous and that Mr. Kohn should be denied all time spent preparing and defending it. In addition, even if I did agree with Respondent, many of the hours questioned either are not necessarily linked to this motion, or involved kinds of work (such as review of expert reports) which would have been useful in other areas of the case. I do agree that some of the hours discussed are excessive (see Respondent's Opposition, pp. 24-26) and will reduce them. From my own review of the various expert reports, I feel that 15 hours for review and analysis of expert reports between June 12 and June 30, 1998 is excessive, and I will reduce this by half, or **7.5 hours**; I also find that the 51.17 hours spent between June 19 and July 31, 1998 researching, drafting and revising the Summary Judgment motion, and preparing exhibits and responses is excessive,[8] and will reduce that total by **20.5 hours**.[9]

Conclusion

Except as stated above, I find that portion of the application dealing with Mr. Kohn to be reasonable, and award 451.42 hours (628.95 hours claimed - 177.53 hours deducted), at a market rate of $300 per hour, or a total attorney fee award of **$135,426.00**.

Ms. Kronstadt

Math Errors

Respondent first argues that Ms. Kronstadt's time records contain a total of .40 in mathematical errors. (See Respondent's Opposition, pp. 34-35; Complainant's Application, Exhibit 3, Attachment B). After reviewing the records I agree and will deduct **0.40 hours** from Ms. Kronstadt's total.

[Page 10]

Excessive Conferencing

According to Respondent's calculations, 5.95 hours (or 30.7%) of Ms. Kronstadt's total billable hours were spent in consultation with Mr. Kohn. (See Respondent's Opposition, pp. 35-36). As Mr. Kohn apparently felt the need to supervise her closely, I feel it would be inappropriate to compensate Ms. Kronstadt for this time at her full rate. Therefore, the court will reduce this amount by approximately one-third, or **2 hours.**

Work to be Billed at Lower Rates

Respondent argues that another 10 hours of Ms. Kronstadt's activities could have been accomplished by a junior and less expensive attorney. (See Respondent's Opposition, pp. 37-38). My review reveals several hours worth of time billed for research, "reading cases," review, or phone conversations, all of which could have been accomplished by an attorney with a lesser hourly rate. Therefore, the court will reduce these hours by one-quarter, or **2.5 hours**.

Respondent also argues that the rest of Ms. Kronstadt's time was spent in factual investigation or scheduling of simple matters, which could have been handled by paralegals at a reduced rate. (See Respondent's Opposition, pp. 38-40). I agree that much of the factual investigation could have been performed by paralegals or clerks, and will therefore reduce these hours billed by approximately one- third, or **2.8 hours.**

Conclusion

Except as stated above, I find that portion of the application dealing with Ms. Kronstadt to be reasonable, and award 17.05 hours (24.75 hours claimed - 7.7 hours deducted), at a market rate of $195 per hour, or a total attorney fee award of **$3,324.75**.

Clerks Complainant also submits records of the hours worked by three different law clerks: Carousel Bayrd, Russell Burchill, and Terrell Stevens. (See Complainant's Application, Exhibit 3, Attachments C, D, and E). I first note that Mr. Kohn's affidavit and the Application for Attorney's Fees and Costs request a total of 185 hours for law clerk work. (See Complainant's Application, p. 41; Kohn Affidavit, p. 13). However, my

review of the hours shown on the various law clerk timesheets reveals a total of only 145 hours, prior to any deductions I might make. Therefore, all deductions are be made from that total.

File Familiarization and Duplicative Efforts

Respondent objects to time spent on "file familiarization" activities by Bayrd. (See Respondent's Opposition, p. 40). On June 8, 1998 Bayrd billed a total of 5.25 hours for reading and organizing the file. I agree with Respondent that hours spent on organization may be billable, but hours spent on file familiarization are duplicative and not reimbursable. (See, e.g., Blum v. Witco Chem. Corp., 829 F.2d 367 (3rd Cir. 1987). However, as Bayrd did not segregate the time spent on each activity, all **5.25 hours** are excluded. (See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)).

[Page 11]

Respondent also objects to 10 hours billed by Burchill as duplicative: 6 hours spent attending the Doyles' depositions on October 3, 1998, and 4 hours spent "research[ing] depositions" on November 2, 1998. (See Respondent's Opposition, p. 42). Respondent objects to the hours billed for attendance at the deposition on the grounds that Complainant failed to demonstrate the need for the attendance of a second attorney or paralegal at the deposition. (See Respondent's Opposition, p. 42). I disagree that the hours spent attending the deposition should be excluded as duplicative, especially since the time billed was that of a clerk or paralegal, not that of an attorney at a higher rate. However, I do agree that the time spent researching depositions was probably simple file familiarization and should not be allowed; thus **4 hours** of Burchill's time is disallowed.

Respondent also objects that 9.25 hours of Stevens' time is for file familiarization and should be excluded. (See Respondent's Opposition, pp. 42-43). However, after reviewing the timesheets, I am persuaded that only **2 hours** on January 27, 1998 spent "review[ing] decisions and orders" should be excluded on this basis. Respondent also objects that another 2.5 hours billed by Stevens on January 27, February 2, and February 11, 1998 is duplicative work and should be excluded. (See Respondent's Opposition, p. 43). However, after reviewing the timesheets, I am not persuaded that these hours were duplicative; therefore the billings will be allowed.

Improperly Documented Work

Respondent also objects that 8 hours of Stevens' time is improperly documented, as it contains no date and no description of work performed. (See Respondent's Opposition, p. 44). After a review of the records, I agree with Respondent and disallow all **8 hours.**

Work to be Billed at Lower Rate

Respondent objects to 5.5 hours billed by Bayrd on June 9, 1998 for work described as "calculate, check medical records, organize medical records, met with Steve, met with Shannon, photocopied documents, create figure chart;" and 6.5 hours on June 10, 1998 for "Arbitration (take notes, help calculate figures, feed meter). (See Respondent's

Opposition, p. 40). While some of these activities are clearly compensable (organizing records, etc.), others are clearly not (photocopying, "feeding" the meter). As the records fail to properly segregate the time spent, the court will disallow all **12 hours.**

Respondent objects to another 21 hours of Burchill's time as primarily clerical in nature and unsegregated, and argues the total hours should therefore be excluded. (See Respondent's Opposition, p. 41-42). I first note that the 7 hours billed on September 14, 1998 for "Scheduling Experts and clients" is clearly excessive, and although I will allow the task, the number of hours will be reduced by half, or **3.5 hours.** Burchill also billed 6 hours between October 28-30, 1998 for "Doyle Out of Pocket Expense Report Research and Data Entry;" while the preparation of this report would be compensable, simple data entry would more properly be considered clerical work. However, as the types of work have not been segregated, I will again exclude the entire **6 hours.** Finally, as the 8 hours billed on November 16, 1998 encompass a large number of tasks without specifying the amount of time spent on each, I will exclude those **8 hours** as improperly documented.

Respondent also objects to 21 hours of Stevens' work as clerical. (See Respondent's Opposition, p. 43). I will allow some of the 9 hours billed on February 2, 1998 for review of expenses, preparation of spreadsheet, and preparation of affidavit, as these tasks are similar to the work of paralegals; however, as the total number of hours spent seems excessive, I will reduce this by one-third, or **3 hours.** However, I disallow all **10 hours** billed on February 3 and 4, 1998 for trips to the Department of Labor to photocopy cases concerning the Davis-Bacon Act, as this task is clearly clerical in nature. Respondent also objects to 2 hours on February 11, 1998 billed for drafting of a letter and faxing of the same; as the report fails to segregate this time into billable (drafting) and non-billable (faxing) time, I will disallow all **2 hours.**

Conclusion

Except as stated above, I find that portion of the application dealing with the law clerks to be reasonable, and award 81.25 hours (185 hours claimed - 40 hours not documented - 63.75 hours in other deductions) at a market rate of $85 per hour, or a total attorney fee award of **$6,906.25**.

COSTS

Expert Witness Fees

Complainant seeks expert witness fees in the following amounts: $5,800.00 for Dr. Steven Jackson; $9,650.00 for Mr. Marvin Hobby; $700.00 for Mr. Randy Robarge. (See Complainant's Application, pp. 43-45). Respondent does not object to the fee for Mr. Robarge, and therefore that **$700.00** is granted. (See Respondent's Opposition, p. 45).

Respondent argues that the amount requested for Mr. Hobby is excessive because he is not an expert and the court rejected him as such. (See Respondent's Opposition, p. 45). Respondent makes the same arguments regarding Dr. Jackson's fee, and points out that he

did little of the work himself, primarily supervising and reviewing Mr. Hobby' work. (See Respondent's Opposition, p. 45). In the alternative, Respondent argues that as both men examined the same calculations and data, the work of one is arguably duplicative. (See Respondent's Opposition, p. 45). Finally, Respondent argues that their own experts cost only $5,518.00, and Complainant's fees should be limited to a similar amount. (See Respondent's Opposition, p. 45).

First, I disagree that Respondent's costs for expert should be controlling. I agree that the charges for Mr. Hobby are clearly excessive as he is not an expert and was rejected as such by the court. Therefore, I will reduce Mr. Hobby's hourly rate from $200 to $85 per hour, which brings his rate in line with the rates of paralegals and law clerks; however, I allow the full 48.25 hours claimed for Mr. Hobby's work, for a total fee of **$4,101.25**. I also believe the charges for Dr. Jackson to be excessive, as he primarily supervised and reviewed Mr. Hobby's work, relying heavily on Mr. Hobby's work in the formulation of his own reports. Although I will allow Dr. Jackson's rate of $200 per hour, I will reduce his time by 14 hours; this results in 15 hours at $200 per hour; or a final award of **$3,000.00.**

Costs Incurred by Law Firm

As Respondent has not objected to any of the other costs incurred by Mr. Kohn's law firm and billed to Complainant (**$3,496.55**), I grant these costs.

[Page 13]

Costs Incurred by Complainant

Complainant also seeks reimbursement for a number of costs directly incurred by the Complainant himself, including: $2018.18 in telephone bills; ,088.00 for travel to Washington, D.C. (two round-trips); $215.29 for hotel and meal costs for one trip to Washington, D.C.; $110.00 for meals and lodging on another trip to Washington, D.C.; $179.20 for travel in Alabama; ,152.00 for faxes sent or received from Complainant's home computer; $128.00 in case related photocopy costs; and $39.44 in postage or delivery costs. (See Complainant's Application, p. 48).

Respondent objects to several of these costs, including: the $759.29 ($544.00 in mileage, and $215.29 in lodging and food) related to the Maybray deposition (another motion related to these costs is currently pending before the court); the $544.00 in mileage and $110.00 in undocumented lodging and meals related to a June 1998 mediation; the 560 miles of travel ($179.20) by Complainant while performing investigations related to his complaint in Alabama; the $128.00 in photocopies and ,152.00 in faxes (argued to be undocumented); and the $20.00 of the $39.44 claimed in postage which is not properly documented. (See Respondent's Opposition, pp. 46-47).

As Respondent has not objected to the **$2018.18** in telephone charges, that amount is awarded.

Respondent is correct that the costs of the Maybray deposition are the subject of separate motions before the court. However, in the interest of judicial economy, I address the subject here. My Partial Order on Summary Judgment Motions of December 17, 1998, ordered Respondent to pay "all reasonable costs related to the deposition of Ms. Maybray;" still at issue are the costs incurred by Complainant for his trip to Washington, D.C. to attend the deposition. Complainant argues that Respondent's failure to properly respond to discovery requests (which led to the court's order that Respondent pay the costs of Ms. Maybray's deposition) makes the decision to have Complainant attend the deposition "reasonable." However, I disagree; I find Mr. Kohn's few arguments weak, and can discern no reasonable need for Complainant's attendance. Therefore, the $759.29 in costs sought for Complainant's attendance at the Maybray deposition are denied.

Respondent also objects to the mileage, food, and lodging expenses claimed from the June 1998 mediation in Washington, D.C. (See Respondent's Opposition, p. 46). As there is no actual documentation of the food and lodging expenses,[10] and no other way I can confirm that any expense was even incurred (as could be done in Johnson v. Bechtel, 1995 ERA-11 (Sec'y Feb. 26, 1996) (allowing certain costs, such as telegrams received by the court, for which no actual receipt could be produced)), I must disallow the $110.00. However, I will award the **$544.00** claimed for mileage, as mileage has been found recoverable (see Johnson v. Bechtel), and the court can confirm both Complainant's attendance at the mediation and the mileage from his home to the Washington, D.C. area.[11]

[Page 14]

Respondent objects that there is no documentation of the miles claimed for travel in Alabama, and again no proof of any out of pocket expense. (See Respondent's Opposition, p. 46). I deny the amount claimed for this mileage, as there is no proof of the actual amount of miles claimed, nor even a list of Complainant's destinations when he allegedly incurred this mileage. This contrasts with the mileage awarded for the June 1998 mediation, where it was possible to calculate the distance from Claimant's home to Washington D.C., and it is known that he did attend the mediation. Therefore the $179.20 requested for travel in Alabama is denied.

Respondent also objects to $128.00 in photocopies and ,152.00 in faxes from Complainant's home computer. (See Respondent's Opposition, pp. 46-47). Complainant requests $2.00 per page for the 288 fax pages (or $576.00) allegedly shown by his computer records (see Complainant's Application, Exhibit 4, Attachment 7), plus an additional $576.00 as an estimated cost for those faxes he cannot prove due to damage to his home and records from a hurricane. (See Complainant's Application, Exhibit 4, pp. 7-8). While I sympathize with Complainant's loss from a natural disaster, I can not award costs for which there is a lack of documentation or any other proof. Therefore, the $576.00 in estimated fax costs is denied. My own review of the fax logs provided reveals a total of 69 transmissions (although no page totals are provided, I assume one page per transmission, as Complainant apparently has). Complainant seeks reimbursement for 219

pages received, but the documentation reveals many instances of errors (noted as Phase B or D error in the results column on the log), and only 128 pages of apparently successful transmission. As my review reveals only 197 pages successfully received or transmitted, Claimant is awarded only **$394.00** for fax costs. As Complainant has provided no documentation or breakdown of his photocopy costs, the $128.00 sought is denied.

Respondent also objects to the $39.44 claimed by Complainant in postage costs, particularly the $20.00 in undocumented costs. (See Respondent's Opposition, p. 47). I agree that Complainant can not recover for undocumented or estimated costs, especially when there is no other circumstantial evidence the costs were incurred. Therefore $20.00 will be struck, and Complainant is awarded only **$19.44** in postage costs.

Conclusion

Therefore, Complainant is awarded $700.00 in expert witness fees for Mr. Robarge; $4,101.25 in expert witness fees for Mr. Hobby; $3,000.00 in expert witness fees for Dr. Jackson; $3,496.55 in miscellaneous law firm costs; $2018.18 in telephone charges; $544.00 for mileage to the June 1998 mediation; $394.00 in fax costs; and $19.44 in postage costs. The total amount of costs awarded equals **$14,273.42**.

[Page 15]

ORDER

It is hereby ordered that Hydro Nuclear Services pay to Complainant's attorney the sum of $145,657.00 as a fee for representation of the Complainant, and to Complainant's attorney and Complainant the sum of $14,273.42 in expenses.

RICHARD D. MILLS
District Chief Judge

Metairie, LA
RDM/bc

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C. F. R. Section 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N. W., Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C. F. R. Sections 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

[ENDNOTES]

[1] This is Complainant's second fee petition. Complainant filed an initial fee application in December 1995, and on July 16, 1996 this court awarded fees and costs for work performed through December 11, 1995. (See Doyle v. Hydro Nuclear Servs., 89-ERA-22

(ALJ July 16, 1996). This Recommended Decision and Order was affirmed by the Administrative Review Board in a Final Decision and Order dated September 6, 1996. (See Doyle, (ARB, Sept. 6, 1996)). Thus the present application covers work done since December 11, 1995.

[2] Complainant has requested costs as well, including: $16,150.00 in expert witness fees, $3,496.55 in costs of Complainant's law firm billed to Complainant, and $4,930.11 in costs incurred directly by Complainant himself. Respondent argues Complainant in entitled to no more than a total of $11,052.17 in costs. These issues will be addressed separately, below.

[3] However, I agree that the rate of inflation is a factor to be considered in determining a proper hourly rate.

[4] Some of the Johnson factors that I feel merit an the increase in Mr. Kohn's rate include: (1) the time and labor involved; (4) the preclusion of other employment; (6) Mr. Kohn's acceptance of the case on a contingent basis; (8) the amounts involved and the results obtained; (9) the experience, reputation, and ability of the attorney; and (12) awards in similar cases.

[5] Usually these entries are identical amounts of time billed on the same day for identical work descriptions.

[6] Respondent has noted several instances of severe over-billing, including: 18 hours for a single phone call on November 6, 1996 (revealed on phone records to have lasted only 18 minutes); 1.67 hours for a phone call on November 12, 1996 (revealed on phone records to have lasted only 10 minutes); and 5 hours for a March 31, 1998 conference call with the court (revealed on phone records to have lasted approximately 5 minutes).

[7] From the evidence presented, it appears the appeal in question was originally brought to the Sixth Circuit, but after Complainant's efforts the appeal was transferred to the Third Circuit.

[8] I note that Complainant claims approximately 18.5 hours for preparation of the Motion for Summary Judgment (and accompanying evidence) but approximately 32 hours for the Reply to Respondent's opposition.

[9] I subtract 4.5 hours from the preparation of the original motion, and 16 hours from the preparation time of responses.

[10] Complainant alleges that these and other records were destroyed by a hurricane in 1998. (See Complainant's Application, Exhibit 4, p. 5).

[11] In addition, unlike Complainant's attendance at the Maybray deposition, I can clearly understand the need to have Complainant present at a mediation session which was attempting to stipulate on major disputed issues.